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ADMINISTRATIVE LAW—The Supreme Court’s Impingement of Chevron’s Two-Step; Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009)

Marianne Kunz Shanor*

INTRODUCTION

The United States Supreme Court decision in Entergy Corp. v. Riverkeeper, Inc. not only continues to call into question the distinction between step one and step two of the Chevron doctrine, but more importantly, it invigorates support for a single-step Chevron inquiry.1 In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, the Supreme Court introduced a two-step doctrinal framework for courts to apply in reviewing administrative agencies’ construction of statutes.2 First, a court must ascertain congressional intent on the specific issue.3 If Congress addressed the specific issue, the analysis ends as both the agency and the court must adhere to the clear intent of Congress.4 However, if a court finds statutory ambiguity or silence, the court must evaluate the second step: whether the agency’s construction of the statute is permissible.5

The Supreme Court invoked the two-step Chevron doctrine in Entergy Corp. to determine whether § 316(b) of the Clean Water Act (CWA) authorized the Environmental Protection Agency (EPA) to use a cost-benefit analysis in promulgating technology standards for cooling water intake structures.6 In a disorderly fashion, the majority opinion addressed the second step of Chevron prior to the first, observing, “But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”7 Entergy Corp. exemplifies the elusive, inconsistent, and unpredictable state of the Chevron doctrine.8 It is imperative the Supreme

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* Candidate for J.D., University of Wyoming, 2011. I would like to thank my family, professors, and the editors of the Wyoming Law Review for their support.

1 129 S. Ct. 1498, 1505–10 (2009); see Matthew C. Stephenson & Adrian Vermeule, Chevron Has Only One Step, 95 Va. L. Rev. 597, 597 (2009) (arguing the two-step Chevron doctrine should be collapsed into a single-step inquiry); infra notes 92–172 and accompanying text (analyzing Entergy Corp. in conjunction with the Chevron doctrine).


3 Id.

4 Id.

5 Id. at 843.

6 Entergy Corp., 129 S. Ct. at 1505.

7 Id. at 1505 n.4.

8 See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6, at 175 (4th ed. 2002).
Court explicitly collapse the two steps of the *Chevron* doctrine into a single-step inquiry—“whether the agency’s construction is permissible as a matter of statutory interpretation.”

This case note will discuss *Entergy Corp.* in relation to the *Chevron* doctrine. The background section will first explore the CWA and then will outline the Supreme Court decision *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Second, the principal case section summarizes the reasoning behind the opinions of the majority, the concurrence in part and dissent in part, and the dissent in *Entergy Corp.* Finally, the analysis section argues the two-step *Chevron* doctrine must be collapsed into a one-step doctrine.

**BACKGROUND**

*Clean Water Act: § 316(b) Cooling Water Intake Structures*

Pursuant to its authority under the Clean Water Act (CWA), the United States Environmental Protection Agency (EPA) promulgates rules to protect the chemical, biological, and physical integrity of the nation’s waters. Section 316(b) of the CWA mandates the EPA “require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” Cooling water intake structures draw water from a nearby source to cool a facility generating electricity or engaging in other commercial processes. As the structures intake water, a serious

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9 Stephenson & Vermeule, supra note 1, at 599.

10 See infra notes 92–172 and accompanying text (examining the importance of *Entergy Corp.* and the *Chevron* doctrine).

11 See infra notes 14–53 and accompanying text (discussing the CWA and *Chevron*).

12 See infra notes 54–91 and accompanying text (presenting the rationale behind the majority, the in-part concurring and dissenting, and the dissenting opinions).

13 See infra notes 92–172 and accompanying text (analyzing *Entergy Corp.* in conjunction with the *Chevron* doctrine).


15 33 U.S.C. § 1326(b) (1972) (emphasis added). The CWA includes other standards that control the type of technology required to reduce pollutants from point sources. See *Entergy Corp.* v. Riverkeeper, Inc., 129 S. Ct. 1498, 1506–07 (2009) (listing and discussing the other CWA standards and the factors the agency may consider in promulgating regulations for those standards); see also id. at 1511 (presenting in a table format the other CWA standards and the factors the agency may consider in promulgation regulations). For a discussion of the other CWA standards and their legislative history, see Patricia Ross McCubbin, *The Risk in Technology Based Standards*, 16 DUKE ENVTL. L. & POL’Y F. 1, 6–23 (2005).

threat to aquatic life occurs because organisms—fish, shellfish, eggs, larvae, and plankton—may become impinged or entrained into the system.\textsuperscript{17}

In 1995, the EPA promulgated new rules for § 316(b) of the CWA based on different types of facilities and divided the facilities into three phases.\textsuperscript{18} In establishing rules for Phase II facilities, the EPA conducted a cost-benefit analysis to determine whether to require a closed-cycle recirculating cooling water system.\textsuperscript{19} The EPA found the costs associated with retrofitting existing facilities with this system outweighed its environmental benefits.\textsuperscript{20} Thus, the Phase II rule promulgated by the EPA did not require Phase II facilities to install a closed-cycle cooling water system.\textsuperscript{21} Section 316(b) of the CWA does not list any factors, including costs or benefits, the EPA may consider in establishing the standard; § 316(b) merely requires the best technology available for minimizing adverse environmental impact.\textsuperscript{22} Consequently, a statutory interpretation issue arose as to whether the EPA may permissibly include a cost-benefit analysis in promulgating rules for § 316(b) of the CWA.\textsuperscript{23}

\textsuperscript{17} Reda M. Dennis-Parks, Riverkeeper, Inc. v. United States Environmental Protection Agency: Finally a Solution the Court Can Live With . . . Almost, 32 ECOLOGY L.Q. 689, 691 (2005). Impingement occurs when aquatic life becomes squashed against the intake screens. \textit{Entergy Corp.}, 129 S. Ct. at 1502. Entrainment of the aquatic life happens when the system suckings organisms into the system. \textit{Id}.

\textsuperscript{18} \textit{Entergy Corp.}, 129 S. Ct. at 1503. Phase I regulates all new facilities and requires those facilities to build a closed-cycle recirculating cooling water system that extracts less water and therefore causes less harm to the aquatic life. \textit{Id}. Phase III standards apply to new offshore oil and gas extraction and other existing facilities, which the EPA manages on a case-by-case basis. Environmental Protection Agency, Fact Sheet Phase III Final Rule, http://www.epa.gov/waterscience/316b/phase3/ph3-final-fs.html (last visited Mar. 13, 2010).

\textsuperscript{19} Environmental Protection Agency, Economic and Benefits Analysis for the Final § 316(b) Phase II Existing Facilities Rule (Feb. 2004), http://www.epa.gov/waterscience/316b/phase2/econbenefits/final.htm; see also Gersen, \textit{supra} note 16, at 271–72.

\textsuperscript{20} Environmental Protection Agency, Economic and Benefits Analysis for the Final § 316(b) Phase II Existing Facilities Rule, D1-3, Table D1-3 (Feb. 2004), http://www.epa.gov/waterscience/316b/phase2/econbenefits/final/d1.pdf.

\textsuperscript{21} \textit{Entergy Corp.}, 129 S. Ct. at 1504.

\textsuperscript{22} \textit{Id}. at 1511. \textit{Compare} 33 U.S.C. § 1326(b) (2006) (listing no factors for the EPA to consider in promulgating the regulations), \textit{with id}. § 1314(b)(1)(B) (listing multiple factors the EPA must consider in implementing regulations, including the cost of the technology in comparison with the benefits of the effluent reduction), \textit{id}. § 1314(b)(4)(B) (listing multiple factors the EPA must consider in promulgating regulations, including the “reasonableness of the relationship” between the costs and the benefits of the effluent reduction), \textit{and id}. § 1314(b)(1)(B), (b)(2)(B) (listing multiple factors the EPA must consider in implementing regulations including the costs of achieving the effluent reduction).

\textsuperscript{23} See \textit{Entergy Corp.}, 129 S. Ct. at 1505–11.
The Chevron Two-Step

Prior to the United States Supreme Court decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court reviewed an agency’s interpretation of a statute either by applying a reasonableness test or, in some cases, applying the Court’s own interpretation.24 When applying either approach, the Court failed to articulate reasoning for why one approach should apply and the other should not.25 Criticisms by lower courts and scholars for failure to sustain consistency or make clear the reasoning behind these inconsistent judgments plagued the Court during the pre-*Chevron* era.26

In its 1984 decision, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court abandoned its prior approaches and developed the two-step doctrine that continues to dominate judicial review of agencies’ interpretation of statutes.27 The issue in *Chevron* involved the EPA’s interpretation of the term “stationary source” in the Clean Air Act Amendments of 1977.28 The EPA argued “stationary source” included all pollution emitting devices within a plant.29 In effect, the EPA embraced the “bubble concept,” which allowed an existing plant to alter or add a pollution-emitting device if total emissions from the plant did not increase.30

On appeal from the United States Court of Appeals for the District of Columbia, the United States Supreme Court outlined a two-step process for courts to use when evaluating agencies’ interpretation of statutes.31 First, the court must look to the statute and determine whether the statutory provision at issue is in fact ambiguous.32 If Congressional intent is clear, the court and agency must

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25 Pierce, supra note 8, § 3.1, at 137.

26 Id. at 137–38; see also Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 Geo. Wash. L. Rev. 829, 834–37 (1990) (discussing the U.S. Supreme Court’s different approaches to agencies’ interpretations of ambiguous statutes prior to the *Chevron* decision).


28 *Chevron*, 467 U.S. at 840–41.

29 Id. at 840.

30 Id.

31 Id. at 842–43.

32 Id. at 842.
follow the unambiguously expressed intent. 33 Second, if the statutory language is ambiguous or silent, then the court must determine if the agency’s interpretation is a permissible construction. 34 If the agency’s interpretation is permissible, Chevron demands deference to the agency. 35

In addressing the first step, whether Congress has directly spoken to the issue, courts may invoke “traditional tools of statutory construction.” 36 Yet, Chevron does not prescribe what constitutes a traditional tool of statutory construction. 37 Furthermore, the United States Supreme Court has used various approaches for determining if ambiguity exists. 38 First, the Court may employ a plain meaning approach. 39 Second, the Court may consider the statutory text and structure, legislative history and intent, and canons of construction. 40 As a result, confusion exists as to how to determine ambiguity at Chevron’s step one. 41 Nevertheless, if a court finds Congress did not specifically address the issue, the court proceeds to the second step. 42

The second step of the Chevron doctrine seeks to ascertain the permissibility of the agency’s construction of the ambiguous or silent statute. 43 The Supreme Court did not specifically state the criteria to determine permissibility. 44 However, the

33 Id. at 842–43.
34 Id. at 843.
35 Id. at 844.
36 Id. at 843 n.9.
37 See id.
38 WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE 149 (3d ed. 2006).
40 A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 57 (John F. Duffy & Michael Herz eds., 2005) [hereinafter GUIDE]; e.g., Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (noting the “text, structure, purpose, and history” indicated no ambiguity of the term “age” under the Age Discrimination in Employment Act); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) (determining reasonableness by considering the statute’s language, history, and policies); see also DeFranco, supra note 26, at 841 (stating canons of construction, the purpose of the statute, conflicting policy considerations, and legislative intent should be evaluated). But see Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351, 355–57 (1994) (discussing the use of legislative history by the Supreme Court in applying the Chevron doctrine). There are also other construction maxims not listed in this article. See GUIDE, supra, at 57.
41 FUNK, SHAPIRO & WEAVER, supra note 38, at 149–52.
42 Chevron, 467 U.S. at 842–43.
43 Id. at 843.
44 See id. at 845. However, the Court certainly suggested deference is appropriate since the administrative agency is the expert. Id. at 844.
Court noted the reviewing court does not need to find the agency’s interpretation as the only permissible one, or even the interpretation the court would reach itself.\(^{45}\) The Court further explained that ambiguity within a statute may be either explicit or implicit.\(^{46}\) Explicit ambiguity indicates Congress expressly granted agencies authority to implement a regulation.\(^{47}\) Courts must grant deference to agencies regulating an explicit ambiguity, unless the regulation is “arbitrary, capricious, or manifestly contrary to the statute.”\(^{48}\) If the statute contains implicit authority, a reasonable interpretation by an agency controls and a court may not substitute its own interpretation.\(^{49}\) If a court finds the agency’s construction permissible, it must grant deference.\(^{50}\)

The underlying policies behind the ruling in *Chevron* included agency expertise, political accountability, and congressional intent.\(^{51}\) *Chevron* commenced a new era of courts’ evaluations of ambiguous statutes interpreted by administrative agencies.\(^{52}\) The *Chevron* era continues to evolve and erode as courts apply the doctrine, as evidenced in *Entergy Corp.*\(^{53}\)

**Principal Case**

In *Entergy Corp. v. Riverkeeper, Inc.*, the United States Supreme Court considered whether the EPA may utilize a cost-benefit analysis in promulgating rules for § 316(b) of the CWA.\(^{54}\) The EPA’s rule excluded Phase II facilities from the requirement of a closed-cycle cooling water system.\(^{55}\) The Court held the EPA

\(^{45}\) Id. at 843 n.11.

\(^{46}\) Id. at 843–44. Contra Linda Jellum, Chevron’s Demise: A Survey of Chevron from Infancy to Senescence, 59 Admin. L. Rev. 725, 779–80 (2007) (arguing the implicit delegation in *Chevron* has been limited by the Supreme Court in subsequent decisions).

\(^{47}\) *Chevron*, 467 U.S. at 843–44.

\(^{48}\) Id. at 844.

\(^{49}\) Id.

\(^{50}\) Id.


\(^{52}\) Gossett, supra note 51, at 688.

\(^{53}\) See generally Jellum, supra note 46, at 743–81 (surveying Supreme Court cases at step one of the *Chevron* doctrine); Kristine Cordier Karnezis, Annotation, *Construction and Application of “Chevron Deference” to Administrative Action by United States Supreme Court*, 3 A.L.R. Fed. 2d 25 (2005) (providing a summary of Supreme Court cases applying the *Chevron* doctrine).


\(^{55}\) Id. at 1504; see supra notes 18–23 and accompanying text (explaining the Phase II regulation).
permissibly interpreted § 316(b) to allow for the use of a cost-benefit analysis under the second step of the Chevron doctrine.\textsuperscript{56}

\textbf{Majority Opinion}

Justice Scalia delivered the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.\textsuperscript{57} The majority initially recognized that the EPA determined § 316(b) of the CWA permitted the comparison of costs and benefits, and noted that the EPA’s interpretation would be granted deference if it was a reasonable interpretation of an ambiguous statute.\textsuperscript{58} In applying the Chevron doctrine, the majority addressed the second prong of reasonableness without first considering whether § 316(b) of the CWA was ambiguous.\textsuperscript{59} The dissent criticized the majority for failing to consider the first step prior to considering the second step.\textsuperscript{60} In response, the majority stated, “But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”\textsuperscript{61}

To determine the permissibility of the EPA’s interpretation, the majority next considered the text of § 316(b).\textsuperscript{62} Section 316(b), in relevant part, provides “any standard established . . . shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”\textsuperscript{63} The Court looked to the meaning of the words “best” and “minimizing.”\textsuperscript{64} The majority determined the meaning of “best” included efficient technology with the lowest cost per unit of reduction.\textsuperscript{65} The majority also found Congress had intended to use the word “minimizing” as a term of degree and not necessarily as meaning the smallest amount.\textsuperscript{66} Furthermore, the Court stated that other provisions of the CWA, which mandated the smallest amount of environmental impact, used words such as “elimination”

\textsuperscript{56} \textit{Entergy Corp.}, 129 S. Ct. at 1510.
\textsuperscript{57} \textit{Id.} at 1501.
\textsuperscript{58} \textit{Id.} at 1505.
\textsuperscript{59} \textit{See id.} at 1505–10.
\textsuperscript{60} \textit{Id.} at 1518 n.5 (Stevens, J., dissenting).
\textsuperscript{61} \textit{Id.} at 1505 n.4 (majority opinion).
\textsuperscript{62} \textit{Id.} at 1505.
\textsuperscript{64} \textit{Entergy Corp.}, 129 S. Ct. at 1505–06.
\textsuperscript{65} \textit{Id.} at 1506.
\textsuperscript{66} \textit{Id.} The Court cited another provision in the CWA as an example. \textit{Id.} The provision states “drastic minimization of paperwork and interagency decision procedures.” \textit{Id.} The Court noted if “minimize” means the smallest amount possible as respondents alleged, then “drastic” becomes superfluous. \textit{Id.}
and “no discharge of pollutants.”  Therefore, the Court concluded the text of § 316(b) did not exclude the comparison of costs and benefits, which evidenced the reasonableness of the EPA’s interpretation.

The majority next compared § 316(b) of the CWA with other CWA standards for controlling point sources to determine the reasonableness of the EPA's interpretation. The CWA provides factors for the EPA to consider in promulgating rules for the other standards, but does not provide any factors for § 316(b). The majority concluded the congressional silence in § 316(b) permitted comparison of the costs and benefits. Otherwise, if the EPA could not consider costs and benefits, it could not consider any other relevant factors, which is completely illogical. As a result, the majority found the silence in § 316(b) indicated the reasonableness of the EPA’s interpretation.

The majority also addressed the EPA’s actions interpreting and implementing § 316(b) of the CWA over the past thirty years, which allowed for the comparison of costs and benefits. The majority further stated that even the environmental groups, states, and power utilities realized some form of cost-benefit analysis is necessary in the implementation of the standard. For all of the previously stated reasons, the majority held the EPA permissibly relied on a cost-benefit analysis in promulgating § 316(b) under step two of the Chevron doctrine.

Justice Breyer: Concurring in Part and Dissenting in Part

Justice Breyer agreed with the majority that the EPA’s interpretation of § 316(b) was permissible under Chevron step two. Justice Breyer considered the legislative history of the various CWA standards, and concluded § 316(b) neither

67 Id.
68 Id.
69 Id. at 1506–08 (demarcating the other CWA standards and conducting a comparison of the other CWA standards and § 316(b)).
70 Id. at 1507 (outlining factors the EPA must consider in promulgating regulations for the other CWA standards and stating Congress did not list any factors for the EPA to consider in implementing § 316(b)).
71 Id. at 1508.
72 Id.
73 Id.
75 Entergy Corp., 129 S. Ct. at 1510. The environmental groups, states, and power utilities observed the statute did not mandate the EPA to force the industry to protect one fish for billions of dollars. Id.
76 Id.
77 Id. at 1515 (Breyer, J., concurring in part and dissenting in part).
requires nor forbids the use of comparison of costs and benefits. However, he determined Congress intended to restrict the EPA’s use of the analysis to a standard of “reasonable” under the circumstances.

Justice Breyer ultimately dissented from the majority’s holding because he believed the case should be remanded to the EPA for consideration of its permit variance under the rules for § 316(b). Under the rules, a facility may be granted a permit variance if it can show the costs of installation are “significantly greater than” the benefits. The EPA’s prior standard required a showing of costs “wholly disproportionate” to the benefits. Since Justice Breyer did not think the EPA adequately explained the new standard, he would remand for it to do so or apply the “wholly disproportionate” standard.

Dissenting Opinion

Justice Stevens, joined by Justices Souter and Ginsburg, issued a dissenting opinion. The dissent argued that Congress intended to prohibit the EPA’s use of a cost-benefit analysis in promulgating § 316(b) of the CWA. Justice Stevens criticized the use of a cost-benefit analysis because it typically finds the costs outweigh the environmental benefits. For this reason, the dissent argued that Congress clearly indicates when the EPA is permitted to utilize the cost-benefit method.

The dissent next addressed the CWA standards and legislative history. The dissent argued Congress specified in the other CWA standards whether the EPA was permitted to use a cost-benefit analysis and § 316(b)’s silence indicated the EPA may not use a cost-benefit analysis. The dissent also found it “puzzling”

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78 Id. at 1512–13.
79 Id. A standard of “reasonableness” includes not necessarily a full drawn cost-benefit analysis, but one which does take into consideration the costs of a decision. Id. at 1514–15.
80 Id. at 1515.
81 Id.
82 Id.
83 Id. at 1515–16.
84 Id. at 1516 (Stevens, J., dissenting).
85 Id.
86 Id. at 1516–17.
87 Id. The Court relied on Whitman v. American Trucking Ass’ns, 531 U.S. 457, 467–69 (2001) (finding that the EPA could not use cost-benefit analysis in implementing a Clean Air Act regulation for a section that was silent on the matter, where other sections gave the EPA authority to consider costs). Entergy Corp., 129 S. Ct. at 1517–18 (Stevens, J., dissenting).
88 Id. at 1518–22; see id. at 1511 (majority opinion) (providing a table listing the other CWA standards).
89 Id. at 1518–22 (Stevens, J., dissenting).
the majority skipped the first step of *Chevron* and proceeded to the second step.\(^{90}\) Consequently, the dissent found § 316(b) unambiguous under step one of the *Chevron* doctrine and that the EPA therefore acted impermissibly.\(^{91}\)

**Analysis**

The United States Supreme Court should explicitly collapse the two-step *Chevron* doctrine into a single-step inquiry: “whether the agency’s construction is permissible as a matter of statutory interpretation.”\(^{92}\) In *Entergy Corp. v. Riverkeeper, Inc.*, the Supreme Court held the EPA’s use of a cost-benefit analysis permissible under § 316(b) of the CWA.\(^{93}\) However, in reaching this conclusion, the Court furthered the uncertainty that has emerged in applying the two steps of the *Chevron* doctrine to agencies’ interpretation of statutes.\(^{94}\)

The majority’s analysis in *Entergy Corp.* began with step two of the *Chevron* doctrine by asking whether the EPA’s interpretation of § 316(b) of the CWA was permissible.\(^{95}\) This appears mismatched with the traditional *Chevron* two-step.\(^{96}\) The root of this issue is captured by the banter between the majority and the dissent; the dissent was “puzzled” by the majority, which addressed the second step of the *Chevron* doctrine prior to the first step.\(^{97}\) Justice Scalia’s poignant response noted, “But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”\(^{98}\)

\(^{90}\) *Id.* at 1518 n.5.

\(^{91}\) *See id.* at 1520–21.

\(^{92}\) Stephenson & Vermeule, *supra* note 1, at 599.

\(^{93}\) *Entergy Corp.*, 129 S. Ct. at 1510.

\(^{94}\) *See infra* notes 146–53 and accompanying text (discussing the inconsistency of the Supreme Court’s application of the *Chevron* doctrine).

\(^{95}\) *See* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 (2009). The Court stated the EPA’s construction of § 316(b) of the CWA—allowing a comparison of the costs associated with the technology in relation to the environmental benefits—governed, so long as it is a reasonable interpretation, not even the only interpretation or the one the court would choose. *Id.* Section 316(b) of the CWA mandates the EPA to “require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” 33 U.S.C. § 1326(b) (1972) (emphasis added).


\(^{97}\) *Entergy Corp.*, 129 S. Ct. at 1518 n.5 (Stevens, J., dissenting).

\(^{98}\) *Id.* at 1505 n.4 (majority opinion); *see also supra* notes 57–76 and accompanying text (discussing the majority’s analysis).
Two-Step or One-Step?

As a practical matter, the Chevron doctrine contains only one single step, not two. When scrutinized closely, Chevron’s two steps beg the same question: “whether the agency’s construction is permissible as a matter of statutory interpretation.” Courts’ applications of the Chevron doctrine demonstrate the redundancy of the two-step analysis and the necessity to consolidate the doctrine into a single-step inquiry.

Step One Applied

In a court’s application of step one, the analysis of step two becomes unavoidably intermingled. The underlying purpose behind step one is to determine whether ambiguity exists in the statutory language. The language within statutes usually contains ambiguity, although it may vary in degree. No precise method of analysis to determine ambiguity exists under step one. Therefore, courts generally look to traditional tools of statutory construction, such as the plain meaning of the text, dictionaries, and the statute’s structure,
history, and purpose. By employing traditional tools of statutory construction, the court will find a range of statutory meanings intended by Congress. The range of statutory meanings includes statutory interpretations that the court would consider reasonable, and also includes the court’s preferred interpretation. The court will then determine if the statute is ambiguous by considering whether the agency’s interpretation falls within this range, which is step two of the analysis—whether the agency’s construction of the statute is permissible. If the court finds the agency’s construction within the range, it must uphold the agency’s interpretation. But if the court finds the agency’s interpretation outside the range, then the agency’s interpretation conflicts with the clearly expressed Congressional intent. Consequently, a court cannot decide step one without utilizing the analysis of step two.

Many of the Supreme Court’s opinions exemplify the redundancy of the Chevron doctrine at step one. For example, in MCI Telecommunications Corp. v. AT&T, the Court decided the Federal Communications Commission (FCC)

106 See supra notes 36–42 and accompanying text (discussing the various methods courts employ to analyze step one).

107 Stephenson & Vermeule, supra note 1, at 601 (discussing the range of permissible interpretations determined by the court, which the statute allows). “Chevron supposes that interpretation is an exercise in identifying the statute’s range of reasonable interpretations,” not finding only one single meaning. Id.; see also Beermann, supra note 51, at 817–18 (noting in Chevron, the Court did not adhere to the “directly spoken to” language of Chevron’s first step, indicating there is not only one single meaning).

108 Stephenson & Vermeule, supra note 1, at 601 (discussing the range of permissible interpretations determined by the court, which the statute allows); see Chevron, 467 U.S. at 843 n.11 (finding the agency’s construction does not have to be the only permissible construction or even the construction the court would reach).

109 Stephenson & Vermeule, supra note 1, at 601 (noting the court must uphold the agency’s construction if it is within the range of permissible interpretations); PIERCE, supra note 8, § 3.6, at 169 (“The question for the court [at step one] is whether the agency’s construction of the language is within the range of meanings that could be plausibly attributed to the relevant statutory language.”); see also Chevron, 467 U.S. at 843 (providing the second step of the Chevron doctrine).

110 Stephenson & Vermeule, supra note 1, at 601.

111 Id. If the agency’s interpretation falls outside of the range, it may also be considered a step-two decision. Id. at 601. The court could find ambiguity within the statute and then rule the agency’s interpretation falls outside the range, therefore making it an impermissible interpretation. Id. at 601–02; see infra notes 126–43 and accompanying text (discussing the redundancy of the Chevron doctrine at step two).

112 Stephenson & Vermeule, supra note 1, at 599–602.

exceeded its authority by deciding all nondominant long distance carriers may optionally file tariffs. The issue involved the ambiguity of the term “modify” under the Telecommunications Act, which grants the FCC the ability to “modify” the requirements of the Act. The FCC argued the term “modify” included “a basic or important change in,” citing only Webster’s Third New International Dictionary. The FCC concluded its decision to allow the nondominant long distance carriers to optionally file tariffs only “modified” the requirements. The Court looked to numerous dictionaries to find the term “modify” unambiguous with one single meaning—a “moderate change.” However, in determining this lack of ambiguity, the Court compared the FCC’s interpretation of “modify”—“a basic or important change in”—with the other dictionary definitions. As a result, the Court blended the two steps by determining the ambiguity of the term “modify” (step one) by using the FCC’s interpretation (part of step two’s reasonableness analysis).

The Supreme Court also decided Immigration & Naturalization Service v. Cardoza-Fonseca at step one of the Chevron doctrine. Under the Immigration and Nationality Act, the Attorney General may grant asylum under § 243(h) if “it is more likely than not that the alien would be subject to persecution,” or under § 208(a) if the alien has a “well-founded fear” of persecution. The Immigration and Naturalization Service (INS) in litigation held § 243(h) and § 208(a) required the same standard of proof—more likely than not. The Supreme Court considered the plain meaning of the statutory language, found it did not contain ambiguity, and concluded the INS’s interpretation of the statute failed to meet step one of Chevron. Certainly, the decision can also be deemed a step-two reversal, because the Supreme Court could have found ambiguity and decided the INS’s interpretation of § 243(h) and § 208(a) was an impermissible interpretation.

114 512 U.S. 218, 234 (1994); see Beermann, supra note 51, at 820 (discussing MCI as an example of the plain meaning approach).
115 MCI, 512 U.S. at 225.
116 Id. at 225–26.
117 Id.
118 Id. at 227–28.
119 Id. at 224–28.
120 See Stephenson & Vermeule, supra note 1, at 599–600.
122 Id. at 423.
123 Id. at 425.
124 Id. at 446–49. The Supreme Court noted § 208(a) allows for a subjective component, while § 243(h) only allows for an objective component. Id. at 431.
125 Pierce, supra note 8, § 3.6, at 170 (noting the Court’s decision in Cardoza-Fonseca could be considered a Chevron step-two reversal because the INS’s interpretation was not a permissible construction of the statute).
Step Two Applied

Application of step two by courts further demonstrates the superfluity of the two steps. In applying step two, the agency’s construction of the statute will be deemed impermissible if it clearly conflicts with the statute that has been determined in step one to be ambiguous on the matter at issue. The court will compare the agency’s interpretation with the statutory text to find whether the agency’s interpretation deserves deference. As a result, a court only applies step two by employing step one. Therefore, Justice Scalia’s footnote correctly noted if the agency’s interpretation conflicts with Congressional intent, it must be deemed unreasonable.

Entergy Corp. exemplifies the fact that applying step two inherently incorporates step one.

The majority held the EPA’s decision to use a cost-benefit analysis for § 316(b) permissible under step two of the Chevron doctrine. However, imagine if the Court found the EPA’s interpretation unreasonable or impermissible. The Court would compare the agency’s interpretation with Congressional intent and find that the agency’s interpretation is excluded by Congressional intent and is therefore impermissible. In effect, this finding would show Congress did actually speak to and possess intentions regarding the precise issue at hand.

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126 Stephenson & Vermeule, supra note 1, at 600; see infra notes 127–43 and accompanying text (demonstrating the redundancy of step two with step one).


128 Stephenson & Vermeule, supra note 1, at 600; e.g., Holly Farms Corp. v. Nat’l Labor Relations Bd., 517 U.S. 392, 401–05 (1996) (evaluating the agency’s interpretation with the statutory language “on the farm” to determine whether the agency’s interpretation was reasonable); Babbitt v. Sweet Home Chapter of Cmty’s for a Great Or., 515 U.S. 687, 697–703 (1995) (comparing generally the agency’s interpretation with the Endangered Species Act); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 414–20 (1993) (assessing the reasonableness of the agency’s decision by comparing the agency’s interpretation with the statutory language).

129 Stephenson & Vermeule, supra note 1, at 600.

130 See id. at 597–98.


132 Id. at 1510.

133 See Stephenson & Vermeule, supra note 1, at 599–600. In discussing Chevron, the United States Court of Appeals for the Eleventh Circuit noted, “[T]here must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways. Those two requirements are obviously intertwined.” Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1219 (11th Cir. 2009).

134 Stephenson & Vermeule, supra note 1, at 600; see also Sweet Home Chapter of Cmty’s for a Great Or. v. Babbitt, 30 F.3d 190, 193 (D.C. Cir. 1994) (finding step one requires traditional tools of statutory construction, which are also pertinent to step two, concluding the exact point where an agency decision may be invalidated is unclear and noting that the Chevron Court never specified which step it was applying).
Instead, the Court could find Congress did speak to the issue and consequently hold the agency’s construction inconsistent with step one rather than invalidate the construction at step two.135

Illustrating this principle, in 1999 the United States Supreme Court for the first time found an agency’s interpretation impermissible under step two in *AT&T v. Iowa Utilities Board*.136 The FCC promulgated an order under the Telecommunications Act of 1996 requiring incumbent local exchange carriers to open a minimum of seven of their network elements to other carriers.137 The Supreme Court found the FCC’s order neglected to consider several of the statute’s requirements.138 First, the FCC did not consider whether it was “necessary” for the other carriers to access the incumbent carriers’ networks.139 Second, the FCC failed to consider whether the other carriers would be “impaired” from entering the market without access to the incumbent carriers’ networks.140 Consequently, the Supreme Court found the FCC’s interpretation of the statute unreasonable, but did not cite *Chevron*.141 The Court could have determined no ambiguity existed within the statutory language and the FCC failed to follow unambiguous congressional intent, thus deciding the case at step one.142 Decisions rendered at the second step of *Chevron* exemplify that the two steps really beg the same question.143

**Importance of the One-Step Analysis**

Explicit standards for evaluating either step one or step two of the *Chevron* doctrine do not exist. For step one, *Chevron* urges courts to use traditional tools of statutory construction, but does not delineate the types of devices that constitute

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135 Stephenson & Vermeule, *supra* note 1, at 600.
137 *Id.* at 387–88. The provision of the Telecommunication Act at issue in *AT&T Corp.* states: In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. 47 U.S.C. § 251(d)(2) (1994) (emphasis added).
139 *Id.* at 388–92.
140 *Id.*
141 *Id.* at 392. The Court does employ language similar to *Chevron* step two and many commentators consider this a step-two decision. GUIDE, *supra* note 40, at 89 n.138.
142 Stephenson & Vermeule, *supra* note 1, at 601.
143 *Id.* at 600.
traditional tools of statutory construction. More importantly, the Court does not specifically articulate a standard of permissibility—what is and is not a permissible construction of the ambiguous statute—for step two.

The United States Supreme Court continually uses inconsistent and elusive applications of the *Chevron* doctrine in reviewing cases of statutory interpretation by agencies. The Court applies the *Chevron* doctrine with varying force and at times ignores the doctrine completely. Additionally, the Court describes the *Chevron* doctrine in different and conflicting manners.

Generally, courts focus on step one of the inquiry and seldom invalidate the agency’s interpretation on step two. In particular, the Supreme Court only

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144 Guide, supra note 40, at 57.

145 Levin, supra note 99, at 1260. *Chevron* distinguishes between express delegation of authority given to an administrative agency by Congress and interpretative authority not expressly given by Congress. 88 C.J.S. Pub. Admin. Law & Procedure § 220 (2009). Courts review express delegation of authority to an agency under the standard of arbitrary, capricious, or manifestly contrary to the statute. Id.; see also *Chevron*, 467 U.S. at 843–44. Interpretative or implicit authority is at issue in this case note, while express delegation of authority is not.

146 Pierce, supra note 8, § 3.6, at 175–89; Levin, supra note 99, at 1260; e.g., United States v. Mead Corp., 533 U.S. 218, 229 (2001) (noting *Chevron* deference is appropriate when Congress granted an agency the power to make a rule carrying the force of law); see Czarnezki, supra note 99, at 774–76. Compare Dole v. United Steelworkers of Am., 494 U.S. 26, 42–43 (1990) (refusing to grant *Chevron* deference), with id. at 43–47 (White, J., dissenting) (disagreeing with the majority and applying *Chevron* deference); compare Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 380–83 (1988) (applying the *Chevron* framework and granting deference), with id. at 386–90 (Brennan, J., dissenting) (declining to apply the *Chevron* doctrine). But see Smiley v. Citibank, 517 U.S. 735, 739–45 (1996) (granting deference under *Chevron* by all Justices).

147 Pierce, supra note 8, § 3.6, at 175–89; e.g., Nat’l Cable & Telecomm. Serv. v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (holding only precedent clearly precluding the agency’s interpretation will prevent deference); Solid Waste Agency v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172–73 (2001) (citing constitutional issues as the reason for not applying *Chevron* deference); Maidin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 134–35 (1990) (finding previous Supreme Court precedent overrides the *Chevron* doctrine); see Sunstein, supra note 27, at 191 (noting the initial inquiry of whether the *Chevron* doctrine applies is “*Chevron* step zero”). See generally Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 980–85 (1992) (surveying Supreme Court cases involving a question of deference).

148 Pierce, supra note 8, § 3.6, at 175–89; see Beermann, supra note 51, at 817–22 (discussing the different approaches the Court applies at step one); see also supra notes 36–42 and accompanying text (addressing the various approaches the Supreme Court has used on step one of the *Chevron* doctrine). Compare *Chevron*, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (finding the first step of the *Chevron* analysis is “whether Congress has directly spoken to the precise question at issue”), with K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291–92 (1988) (stating first step of the *Chevron* doctrine uses the plain meaning of the statute) and Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co., 522 U.S. 479, 501–02 (1998) (applying the “canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning” in determining ambiguity under step one).

149 Czarnezki, supra note 99, at 775; Lawson, supra note 99, at 314; see, e.g., United States v. Geiser, 527 F.3d 288, 299 (3d Cir. 2008) (finding the term “persecution” unambiguous at step
twice invalidated an agency’s construction of a statute relying solely on step two of the doctrine. Since step one inherently involves step two, the practicality and efficacy of applying step two as its own independent step becomes questionable. In addition, if the Supreme Court continues to make critical decisions relying solely on step one, many will believe the case is over when the Court finishes the analysis of step one. Often courts’ opinions decided at step one may be written as step-two opinions.

The Supreme Court’s failure to provide guidelines for step two of the *Chevron* doctrine has caused not only tremendous inconsistency within its own jurisprudence, but also for the lower courts applying the doctrine. Two approaches dominate the second step analysis in the lower courts, as no established criteria for permissibility exist. First, some courts find an agency’s interpretation...
permissible if it is reasonable and may also consider whether the interpretation harmonizes with the statute's plain language, purpose, and origin. Second, other courts will only find an agency’s interpretation of a statute impermissible if it is not arbitrary or capricious.

*Natural Resources Defense Council, Inc. v. EPA* demonstrates the division among the lower courts on the approach to determine permissibility under step two of the *Chevron* doctrine. In that case, the EPA promulgated a rule for storm-water discharges, excluding the requirement of obtaining a permit for certain discharges of sediments. The majority opinion noted the failure of the EPA to follow its previous decisions in the area. Consequently, the court found the EPA’s new rule arbitrary and capricious under the second step of *Chevron*. The dissent criticized the majority for relying on the EPA’s prior approach and instead applied a reasoned analysis test. The dissent argued the EPA gave a reasoned explanation for the change in its ruling and therefore satisfied the second

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156 88 C.J.S. *Pub. Admin. Law & Procedure* § 220 (2009); *e.g.*, Pac. Nw. Generating Coop. v. Dept of Energy, 580 F.3d 792, 806 (9th Cir. 2009) (determining a reviewing court owes deference to a reasonable agency interpretation filling an implicit statutory gap left by Congress); *Fort Hood Barbers Ass’n v. Herman*, 137 F.3d 302, 308 (5th Cir. 1998) (finding an agency’s interpretation permissible if not irrational and reasonably related to the statutory purpose).

157 88 C.J.S. *Pub. Admin. Law & Procedure* § 220; *e.g.*, *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004) (determining an agency’s construction of a statute is impermissible under the second step of *Chevron* if it is “arbitrary, capricious, or manifestly contrary to the statute”); *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003) (asserting when the question is about the reasonableness of an agency’s action, the arbitrary and capricious standard applies); *Natl’ Ass’n of Regulatory Util. Comm’rs v. I.C.C.*, 41 F.3d 721, 726–27 (D.C. Cir. 1994) (“[T]he inquiry at the second step of *Chevron* overlaps analytically with a court’s task under the Administrative Procedure Act (APA), . . . in determining whether agency action is arbitrary and capricious (unreasonable).”); *see Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding a court should consider the following to determine whether an agency’s action is arbitrary and capricious: whether the agency used factors Congress did not intend for it to consider, the agency completely failed to address an important part of the issue, the agency gave an explanation that is contrary to the evidence, or the action “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”); *Pierce, supra* note 8, § 3.6, at 173–74 (stating many circuit courts of appeals apply the *State Farm* reasonableness standard for the second step).

158 526 F.3d 591, 602–11 (9th Cir. 2008); *see Am. Bar Ass’n, Developments in Administrative Law and Regulatory Practice* 2007–2008, at 94–96 (Jeffery S. Lubbers ed., 2009) (discussing the confusion that exists between step two of the *Chevron* doctrine and arbitrary and capricious review in *Natural Resources Defense Council, Inc. v. E.P.A.*).

159 *Natural Res. Def. Council*, 526 F.3d at 593–94.

160 *Id.* 605–07.

161 *Id.* at 606.

162 *Id.* at 608–09 (Callahan, J., dissenting).
step of Chevron. This split decision shows the confusion that exists among lower courts with step two of the Chevron doctrine and the “arbitrary and capricious” review standard.

Instead of clarifying step two, the Court should eliminate the two-step process and consolidate it into one single inquiry: “whether the agency’s construction is permissible as a matter of statutory interpretation.” As previously stated, the Supreme Court and lower courts persistently apply differing standards for each step of the Chevron analysis. Judicial economy requires the different courts to utilize the same standard; otherwise, courts may reach differing results on the same issue. The single-step inquiry provides the framework for courts to maintain flexibility while ensuring a standard all courts will apply consistently.

Furthermore, all of the underlying purposes behind the Chevron doctrine—agency expertise, political accountability, and congressional intent—remain with the single-step inquiry. For example, in Entergy Corp., the Court further advanced the purpose of political accountability by granting deference to the EPA’s interpretation of § 316(b) of the CWA. Under the one-step analysis, administrative agencies may still be held politically accountable for their controversial decisions and retain the flexibility to alter their regulatory decisions. Thus, while the use of cost-benefit analysis by administrative agencies

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163 Id. at 609–11.
164 See Guide, supra note 40, at 86.
165 Stephenson & Vermeule, supra note 1, at 600; see also Levin, supra note 99, at 1284.
166 See supra notes 102–64 and accompanying text (discussing the application of the Chevron doctrine by the Supreme Court and the circuit courts of appeals).
167 Pierce, supra note 8, § 3.6, at 175; see Amanda Peters, The Meaning, Measure, and Misuse of Standards of Review, 13 Lewis & Clark L. Rev. 233, 240–41 (2009) (discussing judicial economy in relation to uniform standards of review for appellate courts); supra notes 102–64 and accompanying text (discussing the application of the Chevron doctrine by the Supreme Court and the circuit courts of appeals).
168 Stephenson & Vermeule, supra note 1, at 604.
169 See id. at 605–09; supra note 51 and accompanying text (discussing the underlying purposes behind the Chevron doctrine).
171 See id.; Stephenson & Vermeule, supra note 1, at 608–09; Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517–18 (1989) (noting one advantage of the Chevron doctrine is an agency’s ability to change its decision compared to static judicial precedent on statutory interpretation and another advantage is an agency experiences political accountability through pressure by the Executive, Congress and its constituencies to interpret a statute “correctly”).
remains controversial, the EPA may be held politically accountable and alter its
decision to use a cost-benefit analysis in the regulation of § 316(b) of the CWA
under the single-step inquiry.172

CONCLUSION

In Entergy Corp. v. Riverkeeper, Inc., the United States Supreme Court held
the EPA’s use of a cost-benefit analysis in setting standards for § 316(b) of the
CWA permissible.173 In reaching its decision, the Court employed the two-step
Chevron doctrine.174 However, the Court, in effect, blurred the line between the
two steps to the point where the steps encompass only one question: “whether the
agency’s construction is permissible as a matter of statutory interpretation.”175 This
decision stands as a clear example of the need to collapse the two-step framework
into one single step.176 As Justice Scalia stated, “But surely if Congress has directly
spoken to an issue then any agency interpretation contradicting what Congress
has said would be unreasonable.”177

172 See Harvard Law Review Ass’n, supra note 170, at 342–52; Entergy Corp. v. Riverkeeper,
Inc., 129 S. Ct. 1498, 1510 (2009) (holding the EPA’s use of cost-benefit analysis permissible,
but not requiring the EPA to use cost-benefit analysis). See generally Frank Ackerman & Lisa
Heinzerling, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection, 150 U. Pa. L.
Rev. 1553 (2002) (advocating against the use of cost-benefit analysis in environmental protection);
Eric A. Posner, Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective,
68 U. Chi. L. Rev. 1137 (2001) (arguing in favor of administrative agencies employing cost-
benefit analysis).

173 See supra notes 57–76 and accompanying text.

174 See supra notes 57–76 and accompanying text.

175 Stephenson & Vermeule, supra note 1, at 600; see supra notes 92–172 and accom-
panying text.

176 See supra notes 92–172 and accompanying text.

177 Entergy Corp., 129 S. Ct. at 1505 n.4.